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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ADELE MARTIN, and
NEAL WAYNE OLSON,
Petitioners,

v.

STATE OF ALASKA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ALASKA

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QUESTION PRESENTED FOR REVIEW

Whether conviction of first degree murder and imposition of the minimum mandatory penalty for that crime constitutes a denial of due process of law to and cruel and unusual punishment of persons who acted while suffering from diminished mental capacity?

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
CONSTITUTION AND STATUTES	iii
STATEMENT OF JURISDICTION	1
QUESTION PRESENTED FOR REVIEW	2
CONSTITUTIONAL PROVISIONS APPLICABLE	2
STATEMENT OF THE CASE	3
A. Adele Martin	3
B. Neal Wayne Olson	10
ARGUMENT STATING REASONS FOR GRANTING THE WRIT	20
CONCLUSION	30
APPENDIX A	1a
APPENDIX B	1b
APPENDIX C	1c
APPENDIX D	1d

TABLE OF AUTHORITIES

CASES

	Page
Crouch v. Justice of the Peace Court of Sixth Precint, 440 P.2d 1000 (Ariz. App. 1968)	26
Hensel v. State, 604 P.2d 222 (Alaska 1979)	24
Johnson v. State, 511 P.2d 118 (Alaska 1973)	24
Mill v. State, 585 P.2d 546 (Alaska 1978)	24
Padie v. State, 557 P.2d 1138 (Alaska 1976)	20,24
People v. Flannel, 603 P.2d 1 (Cal. 1980)	26
Solem v. Helm, ___ U.S. ___, 103 S. Ct. 3001 (1983) .	27
State v. Carson, 640 P.2d 586 (Ore. 1982)	25
State v. Howell, 649 P.2d 91 (Utah 1982)	25

CONSTITUTIONS AND STATUTES

	Page
United States Constitution, Amendment VIII and XIV	2
AS 11.15.010	20
AS 11.15.040	24
AS 11.41.100(a)(1)	3,11 21
AS 11.41.120	22
AS 12.55.125(a) and (c)	10,11 24
AS 12.55.155(a)	3
AS 33.20.010	4

OTHER AUTHORITIES

ALI, Model Penal Code and Commentaries (1980)	20,21 25
G. Fletcher, Rethinking The Criminal Law	20,25

I

STATEMENT OF JURISDICTION

The petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Court of Appeals and the denials of review by the Supreme Court of the State of Alaska in these matters.

The Alaska Court of Appeals affirmed Martin's conviction in an Opinion dated June 10, 1983, reported at 664 P.2d 612 (Alaska App. 1983) (Appendix A). The Alaska Supreme Court denied Martin's Petition for Hearing on October 3, 1983 (Appendix B).

The Alaska Court of Appeals affirmed Olson's conviction in Memorandum Opinion and Judgment No. 398 on August 3, 1983 (Appendix C). The Alaska Supreme Court denied Olson's Petition for Hearing on October 28, 1983 (Appendix D).

This petition is being filed within sixty days of final disposition in each case by the Alaska Supreme Court. This court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

II

QUESTION PRESENTED FOR REVIEW

Whether conviction of first degree murder and imposition of the minimum mandatory penalty for that crime constitutes a denial of due process of law to and cruel and unusual punishment of persons who acted while suffering from diminished mental capacity?

III

CONSTITUTIONAL PROVISIONS APPLICABLE

Amendment VIII to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The applicable portion of Amendment XIV to the United States Constitution provides:

> Section 1 ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of liberty, life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petitioners contend that due to their greatly diminished mental capacity at the time

of their acts, their convictions of first degree murder and punishment for that crime amounts to a denial of fundamental fairness, shocking to the universal sense of justice.

IV

STATEMENT OF THE CASE

A. Adele Martin.

Adele Martin was charged in a criminal complaint dated March 13, 1982 with murder in the first degree for killing Clyde Paustian on March 12, 1982 in violation of AS 11.41.100(a)-(1) (M-CR 1).[1] Martin was indicted for that offense on March 30, 1982 (M-CR 2). The jury returned its verdict of guilty of murder in the first degree on September 9, 1981 (M-CR 60; M-RT 847-850). The minimum sentence allowed under AS 12.55.155(a) (20 years in custody) was imposed on February 3, 1982 (M-RT 811). That sentence is a definite term of

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[1] References to the clerk's record and the reporter's transcript herein as to Martin are preceded by M- and references as to Olson are preceded by O-.

years without probation, but may be reduced one day for every three days of good conduct served, AS 33.20.010. Martin's conviction was appealed on Februay 19, 1982 (M-CR 221) and the conviction has been affirmed (Appendices A and B).

Ms. Martin is in custody in the state correctional institution at Eagle River, Alaska.

Although Martin and Paustian (the victim) were never married to each other, they had been romantically involved, most of the time living as husband and wife, since 1971 (M-RT 277-287). In the fall of 1981, Martin was in the state of Washington taking care of personal and family business and Paustian kept asking her in telephone conversations when she was going to return (M-RT 287-289). However, after she drove up the Alcan Highway when it was icy and dangerous in November, upon her arrival, Mr. Paustian's first words were: "Something's missing in our lives, I'm not happy any more" (M-RT 290). Over the next four months, Martin tried to deal emotionally with that problem, but Paustian would not talk about it; he would just sit and stare (M-RT 291). Martin became

very depressed and resentful, painfully and totally crushed (M-RT 291). Having been brought up as a Catholic (M-RT 260), being in her late 40's (M-RT 257), and having failed in three prior marriages (M-RT 259-270), Martin was in despair, had no hopes, felt that her life was over and a total waste (M-RT 292). She found out Paustian had been seeing another woman and then learned that the other woman was a person for whom she had no respect (M-RT 294, 296). She told Paustian, "This is my home. I worked for it. You are my husband. This is my life. I earned it. You are taking my life from me. You might as well kill me." (M-RT 298). She thought of vandalizing the mobile home they were living in so the other woman would not have her home (M-RT 298) and she thought of leaving, but it snowed and the roads were closed (M-RT 299). She felt that God hated her because she had never been happy in all her life and that she would get even with God by going to hell, so she called on Satan, not wanting to do anything right; she wanted the devil there "and he came" (M-RT 299). On the evening of the fatal incident, when Paustian returned home, he told her what he had

told her just before he left, that he did not want to have anything more to do with her (M-RT 304). She felt total, complete, utter rejection and fury. She got her gun and shot him, a total of five times (M-RT 304, 305). She went to the home of her friends and employers and asked them to call the police (M-RT 168-171). She told the officer she had intended to kill herself with the sixth bullet in the gun, but did not have the guts to do it (M-RT 115). Upon being interviewed by the officer prior to making contact with counsel, Martin could not recall a conscious resolve or decision to kill Paustian and did not know when she decided to do it, but she guessed she decided to do it when she did it (M-RT 121). She told the officer she nad been in a "rage" (M-RT 123), and that she had not wanted to kill Paustian, what she wanted was for him to love her (M-RT 132).

Prior to the incident, Martin's friends had been concerned for her emotional state, having observed that she was very depressed and irrational (M-RT 175), different from her normal cheerful, dependable and relatively quiet behavior (M-RT 176). Another friend

testified similarly (M-RT 195-196). Her employer indicated that her problems had been affecting her performance at work (M-RT 219). Another friend testified that Martin had called her on the telephone numerous times and talked irrationally for long periods (M-RT 232-234). She thought Martin was suicidal (M-RT 235). She would not have believed Martin would injure another person (M-RT 236). Still another friend indicated Martin was acting irrationally and in despair (M-RT 254). Another friend, at whose house Martin stayed while released prior to trial, described how she had told him that "the devil was to her right side and behind her" (M-RT 504).

A clinical psychologist testified that at the time of the incident, Martin had the inability to think rationally and clearly because she was so seriously affected by stress (M-RT 423). She could not really appreciate the wrongfulness of what she was doing (M-RT 424). In his opinion, Martin, at the time of the incident, was borderline mentally ill with borderline psychotic functioning, and she fit more under the concept of deteriorated ability to think than into the class of mental illness

(M-RT 425). Her description of the presence of the devil appeared clearly delusional (M-RT 427).

A psychiatrist testified that when he first saw Martin shortly after the incident, she was extremely upset and unable to be totally coherent (M-RT 590). She was in a chaotic frame of mind which had built up over a 10-day period prior to the incident (M-RT 591). He expressed the opinion that at the time of the incident, Martin's state of mind was sufficiently disordered that it would have severely inhibited her from looking at any alteratives other than having to get out of the situation (M-RT 592). She was simply unable to process long term alternatives (M-RT 592). He concluded that Martin did not have sufficient capacity to form the intent to kill a human being at the time the incident took place (M-RT 6[illegible]). She intended to shoot Paustian, but she did not intend for him to be dead (M-RT 613). For a period of several weeks she could not think logically and was overwhelmed by emotionalism, unable to think through either logical or illogical alternatives (M-RT 645).

A psychiatrist presented as a witness by the State expressed the opinion that Martin intended to kill Paustian, because other actions were unacceptable to her (M-RT 657). She was going through an acute depressive epsoide which precipitated the incident (M-RT 658, 659). According to the State's psychiatrist, it was an irrational murder (M-RT 663), and he explained that to him an irrational murder was the killing where the intent is to kill and killing is seen as the best solution to a person with a problem of some sort (M-RT 664). He acknowledged that Martin's judgment was impaired in the sense of ability to choose reasonable alternatives (M-RT 676). He diagnosed Martin as having been in "an acute depressive epsoide" at the time of the incident (M-RT 685). He acknowledged that the killing of Paustian was not a rational act and that Martin definitely had some real problems (M-RT 702).

The writer of the pre-sentence report stated, "Although her capacity for appreciating the wrongfulness of her behavior appears to have been diminished at the time of the

offense, she was unable to convince a jury" (M-CR 71). Paustian's daughter testified in Martin's behalf at sentencing, expressing the opinion that Martin should be released in less than 20 years (M-RT 792). She stated that she would hate to see two lives lost. Punishing Martin will not bring her father back and he would not want it (M-RT 792). The foreman of the jury which convicted Martin testified that she had not known there was a minimum mandatory penalty and that she personally felt a 20 year sentence is "must too stiff in this particular case" (M-RT 801). Some of the jurors had expressed alarm when they became aware of the minimum penalty (M-RT 802). The trial judge expressed the view that the 20-year sentence would be excessive. He would have had no problem with a period of 10 years, 15 years, or conceivably 20 years, if it were under a system in which parole played a real part (M-RT 809). He then imposed the mandatory 20 year sentence as required by AS 12.55.125(a) (M-RT 811).

B. Neal Wayne Olson.

Mr. Olson was charged first in a criminal information on November 10, 1981 and then in a

Grand Jury indictment on November 25, 1981 with murder in the first degree for killing Marvin Curry on November 10, 1981 in violation of AS 11.41.100(a)(1) (O-CR 1-3). After trial by jury, the jury returned a verdict of first degree murder on June 7, 1982 (O-CR 98). Olson was sentenced on August 12, 1982 to the minimum 20 years in custody provided by AS 12.55.125-(a), plus a five year probationary term after release, Olson having a historical involvement with alcohol (O-CR 106, 107, 168, 169). The conviction was appealed on September 13, 1982 (O-CR 175-180) and the conviction was affirmed (Appendices C and D).

Olson is in custody in the federal institution at El Reno, Oklahoma.

At the time of the incident, Olson was 38 years of age and employed as a warehouseman and delivery man (O-RT 432). The day preceding the incident had been a frustrating and long day at work for Olson, because he and his working partner had made numerous deliveries of refrigerators and other heavy items that day, and then his partner had got the truck stuck in the snow (O-RT 438, 439). Olson's partner was upset and saying they were either going to get

chewed out or fired the next morning because they still had a delivery on the truck when they got off work at 7:30 p.m. (O-RT 440). The tension of the incident led Olson to stop on his way home to visit a friend and fellow worker, who got out a bottle of scotch and, during the visit, Olson had four drinks (O-RT 440, 441). He did not leave the friend's house until about 10:30 p.m. and, feeling the effects of the scotch, he decided to sneak downtown to 4th Avenue and have more to drink (O-RT 441). He did not count the drinks, but guessed he must have had about 10 (O-RT 442). When the bars closed at 2:30 a.m., he left and walked around the streets awhile, concerned and disgusted with himself, knowing he was plastered and that he had to go to work in the morning (O-RT 443). He was depressed, because he had been aware for a long time that he had a drinking problem, and had considered himself a alcoholic (O-RT 444, 445).

When he went to the parking lot where he had left his car, he saw someone hunched down by the driver's door, apparently trying to unlock it (O-RT 448, 449). He thought the man must be a wino trying to break into his car

(O-RT 450). Olson walked up to the man and gave him a push with his fingertips, asking what he was doing with his car (O-RT 450). The man acted startled and starting shuffling off (O-RT 451). Olson thought the man was leaving, so he unlocked the car door and as he did so the man struck him from the left side, and Olson testified that he thought he was unconscious, perhaps for seconds and when he came to he was on his back in the parking lot with his head pointed toward the car and the man on top of him, holding him by the throat and jacket and bouncing his head up and down on the pavement of the parking lot (O-RT 451). Olson thought he went out again and then next recalled the man's thumbs in his eye sockets and it felt like his eyeballs were breaking (O-RT 452). After considerable time of being kicked and hit and pushed around (O-RT 452- 457), Olson found the door handle and pulled on it (O-RT 458). He reached into the car to where he knew he had a gun, which was under the fold down thing in the middle of the bench seat (O-RT 458). He got his hand on the gun and turned to his left and fired (O-RT 459). He got a better grip on the gun with both hands

and fired again, by that time he thought he was standing (O-RT 459). He looked for the guy, but could not see anybody, his vision being very poor (O-RT 459). He got into the car, slammed the door, and locked it, threw the gun on the passenger seat and when his eyes had cleared a bit, he backed out and drove off (O-RT 459, 460).

Olson testified that he thought the man was going to kill him (O-RT 463). He did not shoot at any distinct target and did not remember firing four shots (O-RT 463). Olson denied starting a fight and testified that he thought of himself as the "victim" (O-RT 537, 563). He was not trying to kill anyone, he was just trying to get away, but he acknowledged the gun did not go off by accident and that he shot in the direction he thought a person was standing (O-RT 583, 585). He testified that the shooting was an instinctive reaction because he thought Curry was trying to kill him and he only wanted to get him off, and did not intend to kill Curry (O-RT 602). At the time, he thought it was "him or me," but later he has a lot of regrets (O-RT 603). He was "pretty drunk" at the time (O-RT 600). Approximately

an hour and a half after the shooting, Olson's blood alcohol level was .18 (O-RT 293). The psychiatrist who testified for the defense indicated that the blood alcohol level would have been .21-.23 at the time of the shooting (O-RT 724). A pathologist indicated it would have been .20 or higher (O-RT 821, 824). Curry's blood alcohol reading was .31 (O-RT 162).

All witnesses agreed that the incident occurred on a cold, dark miserable night with rain pouring steadily and heavily (O-RT 76, 191, 247, 285, 300, 504, 945).

The only other witness who saw much of the altercation was delivering newspapers to coin boxes across the street from the parking lot (O-RT 56-59). To some extent he minimized the fight in his trial testimony (O-RT 65), but in a prior deposition, which the witness acknowledged at trial, he had described the altercation indicating that Olson was being kicked and beaten severely (O-RT 105). He did not witness the whole incident because he was looking down and writing part of the time (O-RT 68, 69). He heard a first shot, then looked up and

saw Olson re-aim and then he heard three more shots (O-RT 108).

Olson's account of the fight was corroborated by photographs of the car which were submitted into evidence (O-Ex. 37-40), showing scrapes in the mud along the side of the car where the combatants had brushed against it, and photographs of Olson (O-Ex. 29, 30, 35, F), depicting Olson on the morning of the incident as being soaked and bloody, a gory mess, with his eyes being red and numerous scrapes on his nose, forehead, and face. There was red around both eyelids, both eyes were partly closed and the left eye almost totally closed.

According to the pathologist, one bullet entered Curry's left arm and travelled through his chest and exited the body and hit the right arm (O-RT 137-140), causing a rapidly fatal injury because it went through the aorta and caused massive hemorrhaging (O-RT 140, 141). The other three bullets entered Curry's back and exited the front (O-RT 134, 135). None of these three would have been rapidly fatal (O-RT 145).

A clinical psychologist testified that he had spent about four hours with Mr. Olson and

had administered numerous tests (O-RT 622-625). The tests indicated possible damage to the right side of the brain (O-RT 634), which would result in difficulty adapting behavior to changing circumstances (O-RT 635), including difficulties in areas of judgment, domination by fantasies, hearing things that are not there, and overreacting (O-RT 636). This would put Mr. Olson at a subtantial disadvantage in handling alcohol (O-RT 638). The problems with Olson's brain amounted to organic brain syndrome, or chronic brain syndrome, the characteristics of which are difficulty in understanding intensity of circumstances; difficulty in determining how to respond realistically and difficulty in changing mind or adjusting response, all of which difficulties would be increased with consumption of alcohol (O-RT 641). It would be characteristic for such a person to overreact to minimum provocation (O-RT 643). A person with such maladies would have a hard time malingering in a way that could not be detected (O-RT 650). The psychologist found no evidence that Olson was manipulating the situation or malingering (O-RT 661). Many persons, perhaps millions,

have organic brain syndrome, but it is nevertheless significant and meaningful, and such a person, upon being intoxicated, reaches a point of diminished capacity to make judgments (O-RT 668, 686).

A psychiatrist testified on the basis of six interviews with Olson and reviewing police reports and Grand Jury testimony (O-RT 704-708). According to her, there was indication of abnormality in the right temple area indicated by an electroencephalogram, indicating damage which was compatible with head injuries and alcoholism and confirmed by the psychologist's tests (O-RT 711, 714, 715). Such abnormality would result in exaggerated reactiveness (O-RT 716). According to the psychiatrist, at the time of the shooting, Olson did not have the substantial capacity to appreciate the wrongfulness of his conduct or adjust his behavior to the requirements of the law (O-RT 720). She had no reason to think Olson was not truthful (O-RT 733). The fact that there were four shots when only one was needed illustrated that Olson was frightened for his life and would tend to overreact (O-RT 736). Olson had been physically harmed and

reacted to defend himself (O-RT 737). His judgment in this respect was affected because his frontal lobe functions were impaired (O-RT 737). In his relatively incapacitated condition, his objective was not to kill, but to protect himself (O-RT 738). The psychiatrist's conclusions were based on numerous factors, including the effects of the alcohol, childhood sexual abuse by his father, dreams, visual impairment, small man complex, organic grounds mentioned in the psychologist's report, and the EEG (O-RT 739).

A pathologist presented as a rebuttal witness by the State testified that a person loses the ability to form the intent to kill as a result of alcohol consumption only when he becomes unconscious, which is at about .35 (O-RT 1062, 1063). The psychiatrist presented as a State witness testified similarly (O-RT 876-878, 882). He considered evidence of damage to Olson's brain minimal (O-RT 891) and concluded that Olson had the capacity to form intent (O-RT 896).

V

ARGUMENT STATING REASONS FOR GRANTING THE WRIT

Initially, the common law did not distinguish between murder and manslaughter. However, the concept of "malice aforethought" evolved for the crime defined as murder and the residual category of all other criminal homicides became defined as manslaughter. See, ALI, Model Penal Code and Commentaries (Official Draft and Revised Comments 1980), §210.3 at 44. Under the former statute of Alaska, AS 11.15.010, first degree murder involved a killing by a "person ... of sound memory and discretion, purposely, and ... of deliberate and premeditated malice," Padie v. State,557 P.2d 1138, 1141 (Alaska 1976). Although the test of "premeditation and deliberation" has been a standard feature of legislative gradings of homicides for over 100 years, its influence is declining, and it has been rejected in ALI Model Penal Code, supra, §210.2. See discussion in G. Fletcher, Rethinking The Criminal Law, §4.2 at 255. The concept has been rejected in England and in the newly drafted criminal codes in the United States, Id. Two reasons are given for abandonment of that test: first, in a century of

litigation the courts have been unable to settle upon a consistent interpretation; and, second, penal goals appear to be better served by listing the aggravating circumstances and the mitigating considerations, Id. at 256.

On its face, Alaska's 1978 Revised Criminal Code appears to follow the concepts of the Model Penal Code. AS 11.41.100, in defining murder in the first degree, omits such terminology as premeditation, deliberation, and malice aforethought. It merely proscribes as first degree murder the causing of the death of any person if it is done "with intent to cause the death of another person."

In providing for the crime of manslaughter, ALI Model Penal Code, supra, §210.3, at 43, states:

> (1) Criminal homicide constitutes manslaughter when:
>
> (a) It is committed recklessly; or,
>
> (b) A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the

> circumstances as he believes them to be.

In Alaska's Revised Criminal Code, the provision for manslaughter, AS 11.41.120, is as follows:

> A person commits the crime of manslaughter if he
>
> (1) intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree; or,
>
> (2) intentionally aids another person to commit suicide.

Thus, intentional killing may be either murder in the first degree or manslaughter, under both the Model Penal Code provision and the Alaska provision. The Model Penal Code provision, however, makes it clear that extreme mental or emotional disturbance is a mitigating factor which may reduce the crime to manslaughter. The Alaska provision is not so clear, and the Alaska appellate courts in these cases have ruled that the diminished mental capacity was not "a circumstance not amounting to murder in the first degree." In the Martin case, the trial court used only the word "recklessly" in defining the elements of manslaughter, striking the word "knowingly" from the

instruction just before it was given to the jury, over defense objection and upon urging of the prosecutor (M-RT 713-717; M-CR 46). In the Olson case, the court used the statutory terms in instructing the jury on the elements of manslaughter (O-CR 71), but inconsistently referred to "intentional" killing only as first degree murder in the instruction on diminished capacity and indicated that diminished capacity was a defense only if it eliminated the capacity to form the intent to kill (O-CR 87). In both cases, the prosecutor argued to the jury stridently and repeatedly that if the killing was intended, it could only be murder in the first degree, and that diminished capacity is a defense or mitigation only if there is no capacity to form the intent to kill (M-RT 753, 754, 757, 819, 821, 823, 832, 833; O-RT 1120, 1122, 1181, 1182, 1192, 1200).

Thus, the juries in both of these cases were given no effective option to find the defendants guilty only of manslaughter if they had any capacity whatsoever to form an intent to kill, even if such intent was minimal and the product of an extremely disturbed or diseased mind. This is a departure from the former law in Alaska which required deliberate and premeditated malice to constitute murder in

the first degree, Padie v. State, supra, and under which diminished mental capacity had been recognized to negate that specific kind of intent, Hensel v. State, 604 P.2d 222, 232 (Alaska 1979); Mill v. State, 585 P.2d 546, 550 (Alaska 1978); and, Johnson v. State, 511 P.2d 118, 124 (Alaska 1973). By rejecting diminished capacity as a mitigating factor to homicide in these cases, Alaska has exposed Martin and Olson to much more severe penalties than would have been possible under the prior law. Under prior law, they could only have been prosecuted for manslaughter for which the penalty was not less than 1 year nor more than 20 years, AS 11.15.040. But Martin and Olson have been sentenced under AS 12.55.125(a), which requires a definite term of imprisonment of at least 20 years but not more than 99 years. Had the offenses been mitigated due to diminished mental capacity, they would have been sentenced under AS 12.55.125(c), which requires a definite term of imprisonment of not more than 20 years, but a presumptive term for a first felony conviction, such as in these cases, of 5 years. Thus, the rejection of the diminished capacity defense has resulted in sentences of 20 years, rather than 5 years, in these cases.

It appears to be recognized in most other jurisdictions in the United States, outside Alaska, that an impaired psychological condition of the acused, though short of insanity, provides a ground for classifying an intentional killing as manslaughter rather than murder, G. Fletcher, Rethinking the Criminal Law, supra, at §4.2.2 at 250. The commentary to ALI Model Penal Code, supra, § 210.3 at 68, states:

> Using the concept of diminished responsibility to reduce intentional homicide to manslaughter may be expressed as a refinement of "malice of forethought" to include intent to kill only if that intent is the product of a healthy mind. Alternately, diminished responsibility may be described as a partial defense to murder based on mental abnormality or defect.

Although space is not allowed to cite all the jurisdictions which hold that diminished mental capacity may mitigate a homicide to manslaughter, a few examples include State v. Howell, 649 P.2d 91 (Utah 1982) (interpreting Utah Code Ann., 1953, §76-5-205(1) defining manslaughter, including "under the influence of extreme mental or emotional disturbance"); State v. Carson, 640 P.2d 586 (Ore. 1982) (construing ORS 163.115(1) which recognizes

extreme emotional disturbance as a mitigating factor to homicide); People v. Flannel, 603 P.2d 1 (Cal. 1980) (which recognizes an honest but unreasonable belief in a need to defend as negating the element of malice in homicide, pointing out that California's rule "is almost universally supported by those legal commentaries who have given it consideration"). Other examples are cited in the foregoing cases. It is believed that if this court accepts this petition and allows full briefing, it will be become apparent that Alaska is either alone or virtually alone in rejecting diminished mental capacity as a mitigating factor in homicide cases.

In attempting to define "due process of law" the court in Crouch v. Justice of the Peace Court of Sixth Precinct, 440 P.2d 1000, 1006 (Ariz. App. 1968), stated:

> Generally speaking, the denial of due process of law is a denial of "fundamental fairness, shocking to the universal sense of justice". Kinsella v. United States ex. rel. Singleton, 361 U.S. 234, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960). Speaking of due process of law, our United States Supreme Court has said that a state is free to "regulate the procedure of its courts in accordance with its own conception of policy and

> fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *** Its procedure does not run afoul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

It is the contention of Martin and Olson that the concept that persons suffering under the influence of extreme emotional or mental disturbance at the time of committing a homicide should be treated differently than a person who connives and plans a brutal murder is a "principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental." Such a principle is offended in these two cases.

Recently, this court, in Solem v. Helm, __ U.S. __, 103 S. Ct. 3001 (1983), has applied the principles of cruel and unusual punishments as proscribed by the Eighth Amendment. This court stated:

> In sum, we hold as a matter of principle, that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.

Id. at 103 S. Ct. 3009. Martin and Olson have been convicted, technically, of first degree murder, but the crimes for which they have been convicted are "rooted in the traditions and conscience of our people" as manslaughter. This court explained that:

> ... A court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and, (iii) the sentence imposed for commission of the same crime in other jurisdictions.

Id. at 103 S. Ct. 3011. Again, space in this petition does not permit extensive comments or citations. From the point of view of the victims in these cases, the offense obviously was grave, but from the point of view of society, neither Martin nor Olson is a typical criminal, and both are extremely rehabilitatible. Taking into consideration, however, their ages, the sentences are extremely harsh, even possibly amounting to life sentences. As previously indicated, the sentence prescribed in Alaska for manslaughter is a maximum of 20 years, with a 5 year presumptive sentence for the first offense. Thus, other persons con-

victed of a first manslaughter offense are sentenced to serve 5 years. Similarly, under the former law in Alaska, the maximum sentence for manslaughter was 20 years with possible parole, and, had that law still been in effect, neither Martin nor Olson could have been prosecuted for murder in the first degree. The sentences prescribed for manslaughter in other jurisdictions are similar, a maximum of 20 years being typical, but courts may be allowed greater discretion in sentencing than under the present code in Alaska, and parole is a factor.

The sentences imposed on Martin and Olson are four times the sentences which could have been imposed under Alaska law if diminished mental capacity had been recognized as a mitigating factor to reduce the convictions from first degree murder to manslaughter. The sentences thus are grossly disproportionate penalties and excessive punishment for the acts which were committed under those circumstances, and, therefore, cruel and unusual punishment in contravention of the Eighth Amendment and the Fourteenth Amendment to the United States Constitution. These penalties also offend a principle of justice so rooted in the traditions and conscience of our people as to be

ranked as fundamental because it has long been recognized that the mental element is a prime factor in assessing the gravity of a homicide.

Although the Alaska statute prescribing manslaughter is excessively vague and indefinite, it is not urged that this court must necessarily hold the statutory scheme to be unconstitutional; rather, it is the unnecessary application of that statutory scheme in a harsh and unenlightened manner which has resulted in a denial of due process of law and in cruel and unusual punishment to these petitioners.

VI

CONCLUSION

A writ of certiorari should be issued to review the judgments and opinions of the Alaska Court of Appeals and Alaska Supreme Court.

Respectfully submitted the 1 day of December, 1983.

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Attorney for Petitioners,
Adele Martin and
Neal Wayne Olson

APPENDIX A

IN THE COURT OF APPEALS
FOR THE STATE OF ALASKA

ADELE MARTIN, Appellant, v. STATE OF ALASKA, Appellee.	File No. 6665 OPINION No. 261 June 10, 1983

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: A. Lee Petersen, Anchorage, for Appellant. W. H. Hawley, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

Adele Martin was convicted of murder in the first degree, AS 11.41.100. She received

the minimum twenty-year sentence. She appeals arguing that the court improperly instructed the jury, erred in denying her motion for judgment of acquittal, and erred in denying a motion for mistrial. Martin also contends that the minimum twenty-year sentence for first-degree murder is unconstitutional. We affirm.

Adele Martin shot and killed Clyde Paustian, a man with whom she had lived for approximately ten years at the time of the shooting. During November, 1980, Paustian indicated that he was dissatisfied with their relationship. Nevertheless, for the next four months they continued to reside together, often bickering about their relationship. During that time Martin contemplated suicide. Ultimately it occurred to Martin that Paustian was seeing another woman, and approximately one week before the shooting, Martin discovered who she was. In conversations with friends she discussed destroying Paustian's possessions, and shooting him or the other woman. Martin confronted Paustian with her concerns and was dissatisfied with his response. In her brief she described what happened thereafter as follows:

> [Martin] went and got her gun and shot him. He had just bent over the sink to wash his hands and he looked ...

> at her in terror and cried out and she was horrified with herself. He turned toward her and she pulled the trigger again. He fell sideways and grabbed the door. She was terrified and backed away, wanting to run. She thought she should run away from him, because he would kill her and the door flew open and she heard noise. He was staggering and motioned toward the gun and she pulled the trigger again. His face went blank and he lay down. He just lay down in front of her with a big sigh and stretched out and his elbows came up once. She was terrified, thinking he would get up and kill her, but he didn't. A gurgling noise came in his throat and she was sorry she had done it. She didn't even know why she had done it. She thought he was strangling to death and she said his name and cried a little and then put the gun to his head twice and shot him in the head.

Martin stated that she was "in a rage" when she shot Paustian.

Martin's trial strategy centered on proving diminished capacity.[1] Dr. Ronald

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[1] Former AS 12.45.085 read as follows:

Evidence of mental disease or defect. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense. However, evidence of mental disease

Ohlson, a clinical psychologist, administered the Minnesota Multiphasic Personality Inventory to Martin. He testified that the test showed her to have a marked degree of psychological disturbance. The test profile also showed that Martin was very shy, quiet, withdrawn and anxious. Dr. Ohlson stated that the test gave indications that Martin was chronically depressed.

Dr. Ohlson interviewed Martin for five hours. He testified that Martin felt her whole world stopped after Paustian told her that he did not want anything to do with her. He stated that before getting the gun, Martin felt utterly helpless, alone, hopeless, and extremely confused. He related:

> At that point she had no idea where she was going or what she was going to what she was going to do. And it seemed like to her that her whole world had come to an end. Had stopped at that moment. At that point she went in the other room, feeling nothing, picked up the gun, went back and--and shot him.

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[1] Continued from previous page --
or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within 10 days thereafter or at such later time as the court may for good cause permit, files a written notice of his intent to rely on that defense.

Dr. Ohlson also said Martin did not seem to be thinking clearly after the shooting. Dr. Ohlson believed that at the time she shot Paustian, Martin was suffering from a form of depression known as dysthymic reaction, was irrational, and could not really appreciate the wrongfulness of what she was doing. Based on the difficulty he had reading transcripts of Martin's interviews with the police because of her incoherent sentences and based on his difficulty in following her thinking, Dr. Ohlson concluded that Martin was "borderline mentally ill." He stated that the psychological term mental illness coincides to a great extent with the legal term "insanity." He concluded by stating that Martin "fits more under the concept of the depressive neurosis with the deteriorated ability to think," rather than in the class of mental illness. Dr. Ohlson conceded that Martin's actions after the killing were to a certain extent logical and that she was motivated to shoot Paustian to end his relationship with his paramour.

Dr. Aron S. Wolf, a psychiatrist, also testified on behalf of Martin. He described Martin as extremely depressed at the time of the murder. He stated that Martin suffered from a kind of depression that caused agitation and an inability to think clearly. Dr. Wolf's

opinion was that Martin's state of mind at the time of the killing "would have been disordered sufficiently as to inhibit her from making certain moves that would require specific intent." Martin told Dr. Wolf that she felt that the devil came to her and manifested himself in three days before the killing. Dr. Wolf felt that this was

> further evidence that this depression at that particular point in time had reached psychotic proportions. That not only was there a panic, not only was there a feeling of having to do something, but that somehow in addition a feeling of supernaturalness had come into it, and that she clearly then was in less control of herself than--than she normally is.

Dr. Wolf conceded that Martin intentionally killed Paustian, but concluded that her act of killing was irrational because she had not thought out the consequences of the act of killing and because part of her motive in killing was to know where Paustian was and to deprive the other woman of his company.

The state called Dr. Irvin A. Rothrock, a Fairbanks psychiatrist, in rebuttal. Dr. Rothrock believed Martin, at the time of the killing, was undergoing an acute depressive episode precipitated by the threatened breakup of her relationship with Paustian. Dr. Roth-

rock concluded that Martin's insight was reasonably good, but that her judgment was quite poor. He stated that he believed that Martin intended to kill Paustian when she shot him.

JURY INSTRUCTIONS

Extreme Emotional Disturbance

Martin contends that the trial court erred in refusing to give Alaska Pattern Jury Instruction (Criminal) 41.120(a)(1) (1980) defining manslaughter. It provides that if without legal justification, a person acts with either an intentional, knowing, or reckless state of mind and causes the death of another person under circumstances not amounting to murder in the first or second degree, that person is guilty of manslaughter. This instruction is based on AS 11.41.120(a)(1) which is derived from former AS 11.15.040 which was a catchall provision governing all unlawful killings which were not murder. Alaska Criminal Code Revision Part 1 at 97 (Tent. Draft 1977) [hereinafter cited as Tentative Draft]. In the context of this case Martin contends manslaughter was a lesser-included offense. Martin's proposed instruction differed somewhat from the pattern instruction. It told the jury that Martin could be found guilty of manslaughter if she knowingly caused

the death of another under circumstances not amounting to murder in the first or second degree. At the request of the prosecution and over Martin's objection the term "knowingly" was stricken and in its place "recklessly" was substituted. Martin contends that this substitution amounted to prejudicial error. The prosecutor successfully persuaded the trial court that on the facts of Martin's case any intentional or knowing homicide would be first or second-degree murder, not manslaughter, since only "heat of passion" could reduce a knowing or intentional homicide to manslaughter under current law. The prosecutor also successfully argued that Martin was not entitled to an instruction on heat of passion. Martin objects to this conclusion as well which will be discussed hereafter.

Assuming arguendo that the court was correct in excluding an instruction on heat of passion, Martin nevertheless contends that she could have been guilty of an intentional or knowing homicide which would be manslaughter, not murder. She reasons that the trial court should have permitted her to argue the Model Penal Code concept of "extreme emotional disturbance" as a defense to murder. See Model Penal Code Part II §210.3 commentary at 49

(1980). She notes that Model Penal Code §210.3 provides in relevant part:

> Manslaughter. (1) Criminal homicide constitutes manslaughter when:
>
> * * * *
>
> (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

Id. at 43. She points out that there is a substantial difference between "extreme emotional disturbance" and common law heat of passion, and concludes that she was entitled to have the jury instructed that either theory, if established to the jury's satisfaction, would warrant conviction of manslaughter rather than murder.

We are satisfied that the legislature did not intend to make "extreme emotional disturbance" a defense to murder. We reach this conclusion based upon our evaluation of the Revised Code and particularly the part the Tentative Draft played in its enactment. See Neitzel v. State, 655 P.2d 325 (Alaska 1982) (relationship between the Tentative Draft and

the Revised Code discussed). AS 11.41.100 (murder in the first degree) is based in part on Tentative Draft §11.41.110, except that the Revised Code differentiates murder into first and second-degree murder while the Tentative Draft had only one classification of murder. Compare AS 11.41.100 and AS 11.41.110 with Tentative Draft §11.41.110(a). The Tentative Draft provisions governing murder are based in part upon Oregon Revised Statutes §§ 163.005-115 and in part upon similar provisions from Illinois Criminal Code, Chapter 38 §§ 9-1(a)-(1), (2) and 9-2(a). Tentative Draft, supra at 97. Oregon adopted "extreme emotional disturbance" as a defense to murder in reliance on the Model Penal Code. See, State v. Carson, 640 P.2d 586 (Or. 1982) (discussing and applying former ORS 163.125(1)(b)). The Alaska legislature did not enact a similar statute thus making clear its awareness of this defense and its intention to refuse to enact it. Under these circumstances it would be inappropriate for us to read "extreme emotional disturbance" into the new code as a defense.

Heat of Passion

Martin contends that the trial court erred in denying an instruction on "heat of passion." AS 11.41.115 enumerates defenses to murder. It provides in relevant part:

> (a) In a prosecution under §100(a)-(1) or 110(a)(1) of this chapter, it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.
>
> * * * *
>
> (f) In this section,
>
> (1) "intended victim" means a person whom the defendant was attempting to kill or to whom the defendant was attempting to cause serious physical injury when he caused the death of the person he is charged with killing;
>
> (2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as he reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not alone

or in combination with each other, constitute serious provocation.

This section is derived from Tentative Draft §11.41.110 which provided in relevant part:

> (b) In a prosecution [for murder], it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim. Nothing in this subsection precludes a prosecution for or conviction of manslaughter or any other crime. The defendant shall have the burden of injecting the issue of a defense under this section.
>
> * * * *
>
> (f) In this section
>
> (1) "intended victim" means a person who the defendant was attemtping to kill or to whom the defendant was attempting to cause serious physical injury when he caused the death of the person he is charged with killing;
>
> (2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the actor's situation under the circumstances as he reasonably believed them to be; the term does

> not include mere insulting words, mere insulting gestures, or hearsay reports of conduct by the intended victim.

Tentative Draft, supra at 18-20. This provision in the Tentative Draft was based on Illinois Criminal Code, Chapter 38 §9-2(a). Id. at 97. This Illinois code section as amended in 1972 provided in relevant part:

> Voluntary Manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:
>
> (1) The individual killed, or
>
> (2) Another whom the offender endeavors to kill, but he negligently or accidently causes the death of the individual killed.
>
> Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

Since the Alaska statute is based upon an Illinois statute, cases and commentary interpreting the Illinois statute published prior to the adoption of AS 11.41.115 are persuasive as to its meaning. See Gray v. State, 463 P.2d 897, 902 (Alaska 1970); Carman v. State, 658

P.2d 131, 136 n. 2 (Alaska App. 1983). The committee comments to the Illinois statute indicate that the heat of passion defense as codified parallels the common law.

> The definition and various recognized categories of "serious provocation" appear to have remained in much the same form as under the common law. The test is that of the reasonable man, and only a few categories of provocation have been recognized--substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse; but not mere words or gestures or trespass to property.
>
> * * * *
>
> Section 9-2 is intended to be a concise statement of the common-law offense, compatible with the reported cases in this State. "Sudden and intense passion" is submitted as a brief but adequate descriptive phrase which means the same as the former "sudden violent impulse of passion supposed to be irresistible," followed by a description of the "cooling-off" period which negatives such passion.

Illinois Criminal Code, Chapter 38 §9-2, Committee Comments at 393-94 (1972) (citations omitted).

There are two lines of Illinois authority dealing with factual situations similar to this case. The first line of cases is consistent with the general Illinois view that only substantial injury or assault, sudden quarrels leading to mutual combat, illegal arrests, and adultery with the offender's spouse can mitigate murder to manslaughter. These decisions have sustained trial court refusals to give lesser-included offense instructions on voluntary mansalughter where a person kills his lover or spouse after learning during a verbal quarrel that his victim intends to terminate their relationship. See, e.g., People v. Arnold, 309 N.E. 2d 89 (Ill. App. 1974). Another line of cases involving similar facts appear to reach an inconsistent result. In these cases a lesser-included offense instruction on voluntary manslaughter was given by the trial court at defendant's request and he was convicted of manslaughter. The defendant then appealed citing the first line of cases and arguing that on the facts the crime was either murder or nothing. Understandably, the appellate courts affirmed the manslaughter conviction finding sufficient evidence of "heat of passion." The two lines of cases are discussed

in United States ex. rel. Peery v. Sielaff, 615 F.2d 402 (7th Cir., 1979). There the court stated:

> Some cases do suggest that the break-up of a marriage can give rise to a sudden and intense passion ... All of these cases are challenges to man-slaughter convictions. They illus-trate at most the deference of the reviewing courts to the fact finders determinations.

Id. at 406 (citations omitted).

It is not necessary for us to determine in this case whether we will follow Illinois in limiting the "heat of passion" defense to situations of substantial violence or discover-ed adultery. We are satisfied that even a sub-stantially broader reading of our statute would not entitle Martin to an instruction on "heat of passion" viewing the facts of this case most favorably to her. We reach our conclusion based upon the totality of the circumstances, taking into account the following: (1) Martin learned that Paustian was dissatisfied with their relationship over four months prior to the killing on March 12, 1981; (2) in mid-February, 1981, approximately thirty days before the killing, Martin learned Paustian was seeing another woman; (3) two weeks before the

killing, Martin learned who Paustian was seeing; (4) during the three days preceding the killing Martin spoke on a number of occasions to friends, comparing her situation with that of Jean Harris, whose murder of her lover, Dr. Tranower, under similar circumstances, had received substantial publicity, and telling them that she could kill Paustian and his new woman friend; (5) at the time of the killing, Paustian had not raised his voice, threatened Martin, or tried to strike her; finally (6) Martin testified that immediately prior to the shooting she had asked Paustian how he expected them to get along when he wouldn't have anything to do with her. He had responded, "I don't want anything to do with you now." Martin stated that this rejection precipitated her actions. She went to her art room in a fury to get her loaded gun. She then returned and shot Paustian in the side while he was washing his hands. When Paustian turned in horror, she shot him again and continued to shoot him after brief lapses of time until her gun was nearly empty. Under all these circumstances, we believe the trial court properly found that there was insufficient evidence of "heat of passion" to warrant an instruction on

that defense. See LaLonde v. State, 614 P.2d 808, 809 (Alaska 1979).

Jury Consideration of Punishment

The trial court instructed the jury:

> In arriving at a verdict in this case, the subject of penalty or punishment is not to be discussed or considered by you as that matter is one that lies solely with the court and must not in any way affect your decision as to the innocence or guilt of the defendant.

(Emphasis added.) Martin did not object to this instruction at trial and therefore must establish "plain error" to prevail on appeal. Alaska R. Crim. P. 30(a); Alaska R. Crim. P. 47(b). A plain error in an instruction is one that is both obvious and substantially prejudicial. Carman v. State, 658 P.2d 131, 137 (Alaska App. 1983); Marrone v. State, 653 P.2d 672, 676 (Alaska App. 1982). Martin makes two arguments. First, she contends that the instruction was factually inaccurate since it told the jury that punishment lies "solely" with the court when in fact the legislature has established a minimum twenty-year penalty for first-degree murder. Second, she argues the instruction invaded the jury's province because

it prevented the jury from tempering justice with mercy. Martin argues that the jury should have been permitted to evaluate her conduct in light of a minimum twenty-year sentence and determine whether, in the jury's collective view, her conduct warranted such a severe sentence. If the jury concluded that it did not Martin contends the jury could properly return a verdict of not guilty of first-degree murder regardless of its factual findings on the elements of that offense.

We find no plain error. The instruction accurately told the jury that it should not consider punishment in determining whether Martin was guilty of an offense. See United States v. Caldwell, 543 F.2d 1333, 1364-65 (D.C. Cir., 1975), cert. denied, 423 U.S. 1087, 47 L. Ed. 2d 97 (1976); United States v. Del Toro, 426 F.2d 181, 184 (5th Cir.), cert. denied, 400 U.S. 829, 27 L. Ed. 2d 60 (1970); Commonwealth v. Ferreira, 364 N.E. 2d 1264, 1270 (Mass. 1977). We are satisfied that the instruction in context did not mislead the jury.

Martin's reliance on United States v. Glick, 463 F.2d 491, 494-94 (2d Cir. 1972), is misplaced. There the trial court, in the

absence of the defendant, responded with a single word, "yes," to a jury question whether the court would consider a recommendation for leniency. The appellate court was concerned that the response might have swayed jurors entertaining reasonable doubts to vote for conviction because they believed it was in their power to soothe their consciences by causing little or no punishment to be imposed. In the instant case the instruction was given as part of the general instructions. There is no indication that the Martin jury was ever "hung."

Our decision that jurors should not be permitted to consider punishment in arriving at their verdict is consistent with the Supreme Court's decision in Schade v. State, 512 P.2d 907, 917-18 (Alaska 1973). In Schade, the court followed a decision of the District of Columbia Circuit Court of Appeals, Lyles v. United States, 254 F.2d 725, 728 (D.C. Cir. 1957), cert. denied, 356 U.S. 961, 2 L. Ed 2d 1067 (1958), which held that a defendant, on request, was entitled to an instruction telling the jury that a verdict of not guilty by reason of insanity would not necessarily result in the freedom of the defendant but could result in a

hospitalization order if the trial court was convinced that the defendant was dangerous. See United States v. Brawner, 471 F.2d 969, 997 (D.C. Cir. 1972) (modifying Lyles instruction to reflect 1970 statute). In United States v. Caldwell, the court distinguished Lyles in the following way:

> In Lyles v. United States, supra note 61, we concluded that not all laymen can be presumed to know the true meaning and impact of a verdict of not guilty by reason of insanity. Therefore, we held, jurors must be informed of the relevant consequences of such a finding, to supplement their common knowledge of the simpler verdicts of guilty and not guilty ... That, of course, is a situation very different from the one present here [whether to instruct jurors on the penalties that would result from various verdicts.]

543 F.2d at 1365 n. 164.

We are satisfied that the distinction drawn by the District of Columbia Court of Appeals is sound and that the trial court properly declined to inform the jury of the minimum penalties prescribed by law for those found guilty for first-degree murder. Since the jury was properly instructed not to consider punishment at all in reaching its con-

clusions, it necessarily follows that any misconceptions individual jurors may have had regarding sentencing discretion would be irrelevant to their function and could not constitute prejudicial error.

SENTENCE

For the first time on appeal Martin challenges the constitutionality of the twenty-year minimum sentence for first-degree murder. She argues that it constitutes cruel and unusual punishment in violation of Article 1, §12 of the Alaska Constitution, and the Eighth Amendment of the United States Constitution. She also claims that it deprives her of substantive due process and the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and of comparable provisions in the Alaska Constitution. The State points out that Martin did not raise these issues in the court below and suggests that we may not consider them unless we are satisfied that the minimum sentence constitutes "plain error." Alaska R. Crim. P. 47(b). Without foreclosing further consideration of these issues in the future in light of a more adequate record, we have elect-

ed to address Martin's constitutional arguments at this time.

Martin contends that the statute establishing a twenty-year minimum sentence for first-degree murder is unconstitutional on its face and not only as applied to her. Thus she contends that it is void and that the trial court had no jurisdiction to impose the penalty upon her. The State's argument misconceives the distinction between jurisdictional errors which deprives the court of power to act and alleged plain errors which, while affecting fundamental rights and being substantially prejudicial, do not affect the trial court's jurisdiction. While an appellate court has a great deal of discretion in determining whether to identify a given alleged error as "plain" it must reach challenges to the jurisdiction of the trial court to act. Where the record is inadequate for this purpose a remand is the normal recourse. We are satisfied that a remand is not necessary in this case.

We find little merit in Martin's argument predicated on Article 1, §12 of the Alaska Constitution or her due process, cruel and unusual punishment and equal protection challenges. Legislatures have traditionally

reserved the highest penalties for intentional homicide. Our legislature could reasonably label it an unclassified offense and conclude that a minimum twenty-year sentence was necessary for affirmation of community norms and deterrence of others. The special significance attached historically to murder answers Martin's constitutional claims.

We note that AS 12.55.155 sets out mitigating and aggravating factors to be considered by the trial judge in imposing sentences on those convicted of classified crimes, and 12.55.005 sets out factors to be considered by trial judges in imposing sentences on first offenders convicted of classified crimes. We are satisfied, however, that the legislature has in effect established mitigating factors for homicides by differentiating between the treatment of murder and other felonies is that the aggravating and mitigating factors for classified offenses are determined by the trial judge, while those factors deemed in aggravation or mitigation of homicide are to be determined by the jury. This distinction did not deny Martin the equal protection of the laws.

The judgment of the Superior Court is AFFIRMED.[2]

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2 Martin raises three other issues which we briefly address:

(1) Martin argues that the trial court erred in instructing the jury that "insanity is not an issue." There was clearly evidence in the record from which a jury could have found Martin not guilty by reason of insanity (NGI) under the standard established in Christie v. State, 680 P.2d 310 (Alaska 1978). We are satisfied, however, that Martin knowingly, intelligently and voluntarily waived the right to present this issue to the jury. Her counsel assured the trial court that he did not want instructions based on former AS 12.45.083 (mental disease or defect excluding responsibility). Martin no doubt expected to be acquitted or found guilty of manslaughter and feared that an instruction on the statutory defense might result in a NGI verdict followed by a substantial period of institutionalization. See Clark v. State, 645 P.2d 1236 (Alaska App. 1982) (a woman was charged with attempted murder and found NGI; she was then committed for a period not to exceed twenty years). At oral argument Martin reiterated her position that insanity was not an issue and that she did not want the jury instructed on former AS 12.45.083. Under these circumstances the trial court did not err in giving the instruction it did. In reaching this conclusion we have considered the possible adverse affect of the instruction on Martin's defense of diminished capacity and note that she did not object to the instruction on this ground. Also, considering the context in which the instruction was given, we are satisfied that the jury was not misled into

[2] (Continued from previous page)--

believing that it referred to the defense of diminished capacity.

(2) Martin argues she was entitled to a judgment of acquittal on the ground that diminished capacity was establisehd as a matter of law. We are satisfied that reasonable jurors could differ as to whether the State proved that Martin intentionally shot Paustian despite her mental problems. See former AS 12.45.085. The trial court did not err in denying her motion for judgment of acquittal n the charge of first-degree murder.

(3) Martin argues that the trial court erred in denying her motion for mistrial when the prosecutor asked Dr. Wolf, "Isn't it true a trial judge accused you of having a defense bias?" The trial court sua sponte disallowed the question and instructed the jury to disregard it. While the question was clearly improper and warranted sanction, we do not believe that it amounted to incurable error under the circumstances of this case. We note Dr. Ohlson, who also testified on behalf of Martin, and Dr. Rothrock, who testified on behalf of the State, were in general agreement with Dr. Wolf regarding Martin's diagnosis as it might pertain to the defense of diminished capacity. Under these circumstances, the trial court did not err in denying the motion for mistrial. See Sheakley v. State, 644 P.2d 864 (Alaska App. 1982); Roth v. State, 626 P.2d 583 (Alaska App. 1981).

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF ALASKA

ADELE MARTIN, Appellant, v. STATE OF ALASKA, Appellee.	Supreme Court No. 6665 ORDER Superior Court No. 3AN 81-1440 Cr.

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices. (Moore, Justice, not participating).

On consideration of the petition for hearing filed June 27, 1983 and the response to the petition filed August 5, 1983,

IT IS ORDERED,

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on October 3, 1983.

CLERK OF THE
SUPREME COURT

/S/ Robert D. Bacon
ROBERT D. BACON

ccs: Justices, Counsel,
Court of Appeals Judges,
The Honorable J. Justin Ripley
Appeals Deputy, Anchorage Trial Courts

APPENDIX C

THE COURT OF APPEALS
FOR THE STATE OF ALASKA

NEAL WAYNE OLSON,	)	
	)	
Appellant,	)	File No. 7161
	)	
v.	)	MEMORANDUM OPINION
	)	
STATE OF ALASKA,	)	AND JUDGMENT*
	)	
Appellee.	)	(No. 398)
	)	(August 3, 1983)
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Warren W. Matthews, Jr., Justice of the Supreme Court, sitting by designation, Judge.

Appearances: A. Lee Petersen, Anchorage, for Appellant. Richard W. Maki, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

SINGLETON, Judge.

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* Entered pursuant to Appellate Rule 214 and Guidelines for Publication of Court Appeals Decision (Court of Appeals Order No. 3).

Neal Wayne Olson was convicted of murder in the first degree, AS 11.41.100(a)(1). He was sentenced to twenty-five years imprisonment with five years suspended. He appeals raising three issues. First, he contends that his motion for judgment of acquittal on the charges of first and second-degree murder should have been sustained since the evidence regarding his defense of heat of passion established reasonable doubt as a matter of law. Second, he contends that the conduct of the prosecutor denied him a fair trial. Third, he contends that the introduction into evidence of photographs of the victim was erroneous and prejudicial.[1] We affirm.

STATEMENT OF FACTS

At approximately 4:00 a.m. on November 10, 1981, Neal Wayne Olson shot and killed Marvin Curry in a parking lot located at the corner of Fifth Avenue and C Street in Anchorage. The relevant testimony given at trial by several witnesses may be summarized as follows:

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[1] Olson raises three other issues which he conceded on oral argument were foreclosed by our decision in Martin v. State, ___ P.2d ___, Op. No. 261 (Alaska App., June 10, 1983). We adhere to our decision in Martin.

Lawrence Wagner, a newspaper distributor, was delivering newspapers to a rack across the street from the parking lot when Curry was shot. Wagner recalled seeing Olson and Curry together in the parking lot. He heard one man yell but only heard the words "my car." Wagner saw the two men fighting, and he testified that the "wrestling-type fight" appeared to be a "drunken brawl." Wagner did not see who started the fight but observed that Curry was the dominant force. When Curry walked away from Olson, Wagner turned his attention back to his work only to be interrupted by the sound of a gunshot. Wagner looked up and observed Olson, standing next to his car, fire three more shots, and then drive away in his car. Wagner testified that Curry was thirty to thirty-five feet from Olson when Olson shot him.

Patricia Lee and Thomas Loew, emergency medical technicians working with the Salvation Army's Community Service Patrol, were on duty, driving in the vicinity of Fifth Avenue and C Street in the early morning hours of November 10, 1981. They saw two men "reeling," "clutching" and appearing quite intoxicated. Lee and Loew did not observe fighting. When they determined that the men did not need any aid,

Lee and Loew drove away from the scene. As they did they heard noises they believed to be backfires. Lee and Loew decided to drive back to see if the two men would attempt to drive. Approaching the parking lot, they saw a white Chrysler Cordova, without lights, fishtail out of the parking lot. They followed the white car, observing it run several red lights and exceed the speed limit. Believing they were following a drunk driver, they radioed that information to the police.

Making the connection between the shooting and the drunk driver who had been observed fleeing the scene, Anchorage Police Officer Thomas Imperiale located the white car and followed it for several minutes until Olson pulled over. Officer Imperiale observed a considerable amount of blood on Olson's face although his injuries appeared superficial. Officer Imperiale noticed that Olson had been drinking, but did not appear to be intoxicated. A breathalyzer test administered by Investigator Robert Nichol, ninety minutes after the shooting, revealed that Olson had a .18% breath alcohol content.

Dr. George Lindholm, the pathologist who performed the autopsy on Curry's body, testi-

fied that one bullet entered Curry's left arm, traveled through his chest, and then exited his body hitting his right arm. The bullet punctured Curry's lungs and aorta. This shot was instantly fatal. The other bullets had entered Curry's back and exited his chest and upper abdomen. Photographs of the fatal wounds were admitted into evidence over defense objection.

Dr. Lindholm also testified about Olson's and Curry's intoxication. Curry had .31% blood alcohol and .38% urine alcohol content, indicating substantial intoxication. Regarding Olson's breath alcohol of .18%, Dr. Lindholm testified that Olson's blood alcohol could have been .20% or higher at the time of the incident. Dr. Lindholm believed that despite some coordination loss, an average person with a blood alcohol content similar to Olson's would be relatively uninfluenced mentally by the alcohol and could form an intent to kill. Psychiatrist Dr. Patricia Patrick testified on behalf of Olson that she did not believe Olson intended to kill Curry, but only shot at Curry to protect himself.

Olson testified in his own defense. He was returning to his car after a night of

drinking scotch and beer in bars and later drinking coffee in a cafe. He was upset with himself for drinking so much because he realized that going to work later that morning would be difficult. As he approached his car, he saw Curry by the door. Olson walked up to Curry, who apparently did not notice him until Olson pushed him and asked, "Hey, what are you doing with my car?" Curry struck him, knocking him to the ground. A struggle ensued with Curry on top of Olson, beating Olson's head into the ground. Olson said Curry poked his eyes and Olson felt almost totally blinded. Curry repeatedly kicked and hit Olson, and said, "You honky son-of-a-bitch, I'm going to kill you."

Although the beating by Curry angered and frightened him, Olson testified that he only wanted to get away. When he got to his feet, he reached into his car, grabbed his gun, turned, fired, got a better grip on the gun with both hands, and fired again. Olson said that he did not intend to kill Curry and did not aim the gun. He did not remember firing four shots. Olson considered himself to be quite intoxicated at the time of the shooting.

After all the testimony, the trial court instructed the jury on first and second-degree murder, manslaughter, criminally negligent homicide, and the defenses of diminished capacity, self-defense and heat of passion. The jury found Olson guilty of first-degree murder.

I. DID THE TRIAL ERR IN FAILING TO GRANT THE MOTION FOR JUDGMENT OF ACQUITTAL?

In Elson v. State, 633 P.2d 292, 298 (Alaska App. 1981), aff'd on other grounds, 659 P.2d 1195 (Alaska 1983), we said:

> In reviewing the denial of a motion for judgment of acquittal, this court must consider the evidence and the reasonable inferences arising therefrom in the light most favorable to the state and determine if fair-minded jurors in the exercise of reasonable judgment could differ on the question whether guilt has been established beyond a reasonable doubt. If jurors could so differ, then the case was properly submitted to the jury.

Olson argues that the evidence, as a matter of law, supported his defenses of diminished capacity and heat of passion, and raised rea-

sonable doubts as to the elements of first and second-degree murder.

Diminished Capacity

We are satisfied that Dr. Lindholm's testimony, if believed, would have permitted the jury to find that despite Olson's intoxication he could have formulated an intent to kill. The trial court did not err in failing to grant a judgment of acquittal on the issue of diminished capacity as it relates to first and second-degree murder.

Heat of Passion

Alaska Statute 11.41.115 provides in relevant part:

> (a) In a prosecution under §100(a)(1) or 110(a)(1) [first second-degree murder respectively] of this chapter, it is a defense that the defendant acted in heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim.
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> * * * *
>
> (f) In this section,
>
> (1) "intended victim" means a person whom the defendant was at-

tempting to kill or to whom the defendant was attempting to cause serious physical injury when he caused the death of the person he is charged with killing;

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as he reasonably believed them to be; insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not, alone or in combination with each other, constitute serious provocation.

Olson's testimony regarding his quarrel with Curry, the injuries he received, and the circumstances of the shooting clearly warranted an instruction on the defense of heat of passion. See Martin v. State, __ P.2d __, Op. No. 261 (Alaska App., June 10, 1983). Construing the evidence most favorably to the state, however, we believe reasonable jurors could have rejected the heat of passion defense. The jury was obligated to disregard evidence of Olson's intoxication when evaluating the reasonableness of his conduct in light of the surrounding circumstances as he believed them to exist. AS 11.41.115(f)(2).

Wagner testified that the fight did not appear serious, and both Officers Imperiale and another officer, Eric Feichtinger, who observed Olson after the shooting, testified that Olson's facial injuries appeared superficial. Wagner's testimony, if believed, supports an inference that the fight had ended when Curry walked thirty to thirty-five feet away from Olson, but Olson drew his pistol and shot. The jury could well have found that the struggle as described by the state's witnesses would not have seriously provoked a reasonable person. Alternatively, the jury could have concluded under all the facts and circumstances that a reasonable person's passion if aroused would have cooled by the time Olson shot Curry. AS 11.41.115(a).

We are satisfied that the trial court did not err in sending this case to the jury on the issues of first and second-degree murder.

II. DID THE CONDUCT OF THE PROSECUTOR DENY OLSON A FAIR TRIAL?

Olson claims the conduct of the prosecutor denied him a fair trial.[2] Olson concedes

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[2] Olson has combined his attack on the prosecutor under a single heading in his brief, making it difficult for us to separately identify and analyze the conduct to which he objects.

that he did not object at trial to most of the matters he questions now. In order for this court to consider the objections for the first time on appeal we must find plain errors affecting Olson's substantial rights. Alaska R. Crim. P. 47(b).

Olson complains that the prosecutor commented on his exercise of his right to remain silent. However, Olson does not dispute that he made full statements to the police which entitled the prosecutor to point to inconsistencies in his trial testimony. See Weston v. State, 656 P.2d 1186, 1191 (Alaska App. 1982). We have reviewed the record and find no error in this regard.

Olson complains that the prosecutor improperly cross-examined Dr. Patrick. On direct exam, Dr. Patrick was asked whether she believed Olson had the intent to kill when he shot Curry. She replied: "I believe that at the time of the shooting Mr. Olson felt he was defending himself from further harm and that it

was not his objective to kill the other person, but simply to protect himself." In support of her conclusion she listed a number of factors which she considered to specifically indicate that Olson was essentially a non-aggressive person. On cross-examination, Dr. Patrick was asked: "Are you aware of Mr. Olson's criminal background?" Olson did not object and the prosecutor proceeded to ask Dr. Patrick whether or not Olson's perceptions were consistent with objective reality. She answered, "No." She conceded that while Olson had drawn his gun with the belief that he needed to defend himself, his perceptions were not in accord with objective reality as he described it to Dr. Patrick. We believe these questions and the answers given were reasonable cross-examination relating to Dr. Patrick's testimony that Olson was a non-agressive person who in shooting Curry acted reasonably under the circumstances and did not intend to kill Curry.

Also, we do not find that the prosecutor's questioning of Dr. Patrick regarding Olson's drug use was improper under the circumstances. In support of Olson's diminished capacity defense Dr. Patrick testified that Olson had brain damage and listed as possible causes

alcohol or drug abuse. The prosecutor asked Dr. Patrick to identify the drugs which she knew Olson had used. She mentioned marijuana, LSD and amphetamines. This led to further questions to which she conceded that marijuana would not cause brain damage and that LSD and amphetamines would not cause the brain damage Olson suffered. Olson did not object to these questions. We find no plain error. See Randall v. State, 583 P.2d 196, 200 (Alaska 1978).

Olson next argues that the prosecutor improperly asked him on cross-examination whether he was aware that carrying a concealed weapon in a car was a crime. Olson responded: "I don't know how the law reads on that. I thought it was legal now since they passed that law a year and a half, two years ago." After objection and voir dire out of the presence of the jury, the trial court permitted the prosecutor to question Olson about a previous conviction for carrying a concealed weapon in a vehicle. The state argues that the prior conviction serves to impeach Olson's credibility by showing Olson's knowledge that carrying the weapon was illegal and thus established a conflict with his testimony at trial. The im-

peachment arguably addressed a collateral matter. See Babinec v. State, 586 P.2d 966, 968 n. 14 (Alaska 1978). Generally, whether to permit cross-examination on collateral matters is within the discretion of the trial court. C. McCormick, Law of Evidence §36, at 70-71 (2d ed. 1972). When we consider the totality of the circumstances, we are satisfied that if any error occurred, it was harmless. Alaska R. Crim. P. 47(a).

Olson complains that the prosecutor characterized him as a liar in final argument to the jury. After reviewing the record, we find the prosecutor's statements to be "fair comment" in light of the evidence. Olson's credibility was questionable. His testimony was arguably contradicted by Wagner, Lee and Loew, and by the physical evidence.

Finally, Olson contends that the prosecutor misstated the law regarding intent and first-degree murder to the jury. Olson's arguments were rejected in Martin v. State, __ P.2d __, Op. No. 261 (Alaska App., June 10, 1983). We hold that Martin is controlling and thus we find no error.

III. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE PHOTOGRAPHS OF CURRY'S BODY?

Prior to trial, Olson had filed a motion for a protective order prohibiting admission of the photographs at trial. However, at trial, the photographs of Curry's fatal wounds were admitted over defense objection. In Stevens v. State, 443 P.2d 600, 603 (Alaska 1968), cert. denied, 393 U.S. 1039, 21 L. Ed. 2d 586 (1969), the court stated:

> This court has held that a photograph is admissible in evidence in the discretion of the trial judge, as an aid to the court or jury, after it has been shown to be a faithful representation of whatever it purports to depict, provided it is relevant, and provided its evidentiary value is not outweighed by any prejudice it might create.

(Footnotes omitted.) See, also, Sheakley v. State, 644 P.2d 864, 870 (Alaska App. 1982). Olson does not argue that the photographs do not accurately depict Curry after he was shot. Nor does the record support a finding that the photographs were particularly gruesome. Olson's claim is that they had no evidentiary value. We disagree. Olson strongly argued that his intoxication and the severe beating

allegedly administered by Curry rendered him virtually blind so his shots were fired without aiming, essentially as a reflex. The photographs demonstrate that all four shots struck Curry and that the final three shots were in close proximity to each other. Curry and Olson were separated by as much as thirty-five feet when Olson shot Curry. The photographs corroborate the state's theory that Olson's act was intentional and that his intoxicaton, anger and injured eyes did not render his action a mere reflex. We find no abuse of discretion in admitting the photographs.

The judgment of the Superior Court is AFFIRMED.

APPENDIX D

IN THE SUPREME COURT
FOR THE STATE OF ALASKA

NEAL WAYNE OLSON, Petitioner, v. STATE OF ALASKA, Respondent.	SUPREME COURT NO. S-113 ORDER SUPERIOR COURT NO. 3AN 81-6945 Cr. COURT OF APPEALS NO. 7161

Before: Burke, Chief Justice, Rabinowitz, and Compton, Justices. (Matthews and Moore, Justices, not participating).

On consideration of the petition for hearing filed October 4, 1983 and the response to the petition filed October 12, 1983,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on October 28, 1983.

CLERK OF THE
SUPREME COURT

/S/ Robert D. Bacon
ROBERT D. BACON

ccs: Justices, Counsel,
Court of Appeals Judges, The Honorable Warren W. Matthews, Pro Tem Judge,
Appeals Deputy, Anchorage Trial Courts